No. 90-1596

SUPREME COURT, U.S.
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In the Supreme Court Of The United States

October Term, 1991

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, Petitioners

v.

SEATTLE AUDUBON SOCIETY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS THE ASSOCIATION OF O & C COUNTIES AND BENTON COUNTY IN SUPPORT OF PETITIONERS

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Pursuant to Rules of the Supreme Court 24.2, respondent is satisfied with Petitioner's question presented, statement of parties to the proceeding, opinions below, jurisdiction and statutory provision involved.

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Respondents the Association of O & C Counties and Benton County (collectively hereinafter the "O & C Counties"), defendants-intervenors-appellees below, respectfully join in and support the petitioners' challenge to the judgment of the United States Court of Appeals for the Ninth Circuit (the "Court of Appeals") in this case.

STATEMENT OF THE CASE

The O & C Counties adopt and join in the Statement of the Case set forth in the brief of petitioners F. Dale Robertson, Chief, United States Forest Service, the United States Forest Service, and Manuel Lujan, Jr., Secretary of the Interior.

The O & C Counties supplement the Statement of the Case set forth in petitioners' brief with the following information concerning the O & C Counties and their interest in this litigation:

The Association of O & C Counties consists of 18 Western Oregon counties, including Benton County, that have specific, statutorily established interests in certain federal lands affected by the spotted owl controversy. The interests arise under the Oregon & California Lands Act of 1937, 43 U.S.C. § 1181a, et seq. (1982) (the "O & C Act").

The O & C Act, like the appropriations statute at issue in this appeal, reflects Congress' sensitivity to the needs of rural communities that historically have played a vital role in supplying the nation's need for high-quality public timber. In the early part of this century, Congress attempted by various means to provide support for local governments in the sea of federal timber that is Western Oregon. *See Skoko v. Andrus*, 638 F.2d 1154, 1156 (9th Cir. 1979) (describing legislation enacted in 1916 and 1926); *Clackamas County, Ore. v. McKay*, 219 F.2d 479, 483 (D.C. Cir. 1954), *judgment vacated as moot*, 349 U.S. 909 (1955) (describing attempts to compensate local governments for the fact that federal lands had not passed into private ownership and therefore were not part of the

tax or industrial bases). Congressional efforts prior to 1937 to support western Oregon's local governments failed. In 1937, the O & C Act created a special category of federal lands located in the O & C Counties (the "O & C Lands") and provided that those lands are to be managed by the Bureau of Land Management ("BLM") apart from all other lands under the jurisdiction of either the BLM or the Forest Service. Congress succeeded with the O & C Act in creating an economic foundation for regional development.

Unlike the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. 1701, *et seq.* (1982), and other federal land management statutes that contain multiple use mandates, the O & C Act provides that the O & C Lands are to be managed primarily for the sustained yield production of timber so as to provide an economic foundation for local communities. 43 U.S.C. 1181a; *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1183-84 (9th Cir. 1990). In addition to guaranteeing a source of raw materials for the private sector economy, the O & C Act provides for direct payment of a portion of timber sale revenues to the county governments of the O & C Counties. Most of the BLM lands at issue in this appeal are O & C Lands from which the O & C Counties are entitled to 50 percent of timber sale revenues.

ARGUMENT SUMMARY

Modification or repeal of existing environmental statutes falls within Congress' plenary power to manage federal lands and to provide for the support

of timber-dependent communities. Section 318(b)(6)(A) of the Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, Tit. III, § 318(b)(6)(A), 103 Stat. 745 (1989) (the "1990 Appropriations Act"), can fairly be interpreted as a temporary, geographically limited repeal of the environmental laws that provided the basis for the environmental groups' claims in these consolidated cases. Such an interpretation is mandated because acts of Congress enjoy a presumption of constitutionality and must be construed, if possible, in a manner that renders them constitutionally valid. Applying this interpretation, this Court should reverse the Court of Appeals' invalidation of the 1990 Appropriations Act. Alternatively, this Court should reverse the Court of Appeals' holding because the limitation of federal court jurisdiction set forth in section 318 precludes any finding of fact or law with respect to the section 318 management guidelines.

ARGUMENT

I. INTRODUCTION

Congress responded to court-imposed timber sale injunctions and resultant dwindling timber supplies in the O & C Counties and elsewhere in the Pacific Northwest by including interim protective measures in the 1990 Appropriations Act. The purpose of the protective measures was to provide temporary relief for local economies dependant upon the timber industry. As a part of the interim relief, Congress, in section 318(b)(6)(A), provided as follows:

> Without passing on the legal and factual adequacy of . . . the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsection[] . . . (b)(5)[1] of this section on . . . Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for . . . the case *Portland Audubon Society et al. v. Manuel Lujan, Jr.*, Civil No. 87-1160-FR. The guidelines adopted by subsection[] . . . (b)(5) of this section shall not be subject to judicial review by any court of the United States.

Seattle Audubon Society and the other respondent environmental groups contend that this provision invades the province of authority reserved to the judicial branch of the government and is therefore unconstitutional.

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[1] Section 318(b)(5) of the 1990 Appropriations Act provides that

> [n]o timber sales offered pursuant to this section on Bureau of Land Management lands in western Oregon known to contain northern spotted owls shall occur within the 110 areas identified in the December 22, 1987 agreement, except sales identified in said agreement, between the Bureau of Land Management and the Oregon Department of Fish and Wildlife. Not later than thirty days after enactment of this Act, the Bureau of Land Management, after consulting with the Oregon Department of Fish and Wildlife Service to identify high priority spotted owl area sites, shall select an additional twelve spotted owl habitat areas. No timber sales may be offered in the areas identified pursuant to this subsection during fiscal year 1990.

II. SECTION 318(B)(6)(A) IS A PERMISSIBLE EXERCISE OF CONGRESSIONAL AUTHORITY OVER PUBLIC LANDS

A. Acts of Congress Are Presumed To Be Constitutional

When a party calls into question the constitutionality of an Act of Congress, the appellate court assumes "'the gravest and most delicate duty [an appellate court] is called on to perform.'" *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)). Federal statutes are entitled to a presumption of constitutionality. *See Walters v. National Ass'n of Radiation Survivors*, 468 U.S. 1323 (1984). As Judge Dwyer recognized below in his opinion holding section 318(b)(6)(A) constitutional, courts are to construe federal statutes "'so as to avoid serious doubts as to their constitutionality, and when faced with such doubts the [c]ourt will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid.'" *Seattle Audubon Society v. Robertson*, Civil No. 89-160-WD, Memorandum Decision Re: Constitutionality and Retention of Jurisdiction at 6 (W.D. Wash. Nov. 14, 1989) (quoting *Communications Workers of Am. v. Beck*, 487 U.S. 735, 762-63 (1988) (Petition for Certiorari at 25a.)).

B. Section 318 Can Fairly Be Construed As a Constitutionally Valid Temporary Displacement of Pre-Existing Environmental Laws

In *Seattle Audubon Society v. Robertson*, Judge Dwyer held that "Section 318 can and must be read as a *temporary* modification of the environmental laws. As such it is well within Congress' constitutional power." *Seattle Audubon Society v. Robertson*, Civil No. 89-160-WD, Memorandum Decision Re: Constitutionality and Retention of Jurisdiction at 6 (emphasis added) (Petition for Certiorari at 25a.). In *Portland Audubon Society v. Lujan*, Judge Frye adopted Judge Dwyer's reasoning and also held that section 318 was constitutional. *Portland Audubon Society v. Lujan*, Civil No. 87-1160-FR (D. Or. Dec. 21, 1989) (Petition for Certiorari at 37a-38a.).

The environmental groups concede, and the Court of Appeals specifically acknowledged, that if section 318 is interpreted as a temporary modification or repeal of the environmental laws that provide the basis for the claims in this case, then section 318 is constitutional. *Portland Audubon Society v. Lujan*, Ninth Circuit No. 90-35120, Appellants' Opening Brief at 14; *Seattle Audubon Society v. Robertson*, No. 90-35120 (Oct. 30, 1990) (Petition for Certiorari at 11a.). To support its judgment below, the Court of Appeals characterized section 318 instead as an attempt to "prescribe[] a rule for the decision of a cause in a particular way, without changing the underlying laws . . . ." (Petition for Certiorari at 16a.) In adopting this characterization, the Ninth Circuit panel

failed to adopt an available and proper interpretation that would have sustained section 318. Setting aside the question of whether there is a valid distinction between prescribing a rule of decision and changing underlying law,[2] section 318 clearly can be interpreted as a modification or partial repeal of FLPMA and the other environmental laws invoked by the environmental groups in the district courts below. The wording and legislative history of section 318 support such a construction. In the first sentence of section 318(b)(6)(A), Congress specifically stated that it was not passing on "the legal and factual adequacy" of the Forest Service and BLM documents challenged by the environmental groups. Rather, Congress' clear intent was to render the named lawsuits temporarily moot by adopting its own statutory management plan

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[2] In *In re Consolidated United States Atmospheric Testing Litigation*, a case relied upon by the Court of Appeals below, the Court of Appeals held that "'Congress violates the separation of powers when it presumes to dictate "how the Court should decide an issue of fact (under threat of loss of jurisdiction)" and purports to "bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds."'" *Atmospheric Testing*, 820 F.2d 982, 992 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988) (quoting *United States v. Brainer*, 691 F.2d 691, 695 (4th Cir. 1982) (quoting P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* at 316 n.4 (2d ed. 1973))). As the Court of Appeals correctly concluded in *Atmospheric Testing* but now disaffirms, the separation of powers principle is violated only when Congress presumes to dictate how an Article III Court should decide *an issue of fact*.

and prohibiting judicial review of the agencies' implementation of the plan.[3]

Nor did Congress proclaim, as the environmental groups seem to contend, that the measures adopted in section 318 meet the requirements of FLPMA or the other environmental statutes that provided the bases for the claims in the district courts. The legislative history establishes that Congress was making a policy judgment about how to address the environmentalists' concerns about the spotted owl, rather than pronouncing a conclusion of law: "This expanded reservation of areas for spotted owls again is deemed *adequate to address* for fiscal year 1990 only

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[3] The House Conference Report states:

> Section (b)(6)(A) does not pass on the legal sufficiency of the . . . BLM/ODFW agreement insofar as each addresses concerns about the northern spotted owl. However, inasmuch as subsection[] . . . *(b)(5) establish[es] interim [Spotted Owl Habitat Area] standards* for the fiscal year 1990 which protect more habitat than currently protected by the . . . BLM, *subsection (b)(6)(A) removes for fiscal year 1990 the sufficiency or insufficiency of those standards* as a reason for injunctive relief.

H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 88, 89 (1989) (emphasis added); *see also id.* at 88 ("[t]he legal adequacy of and prohibition against judicial review of the SOHA framework established in this section should not be construed to moot future action after fiscal year 1990 in the *Portland Audubon Society v. Lujan* case"). In other words, the standards supplied in other legislation by which forest management is normally judged were temporarily replaced by section 318's standards. Section 318's interim standards were plainly a temporary modification of the statutory bases for the underlying claims in *Portland Audubon Society v. Lujan*.

the concerns raised in the *Portland Audubon Society v. Lujan* case." H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 88 (1989) (emphasis added).

Thus, among two possible interpretations of section 318, the district courts chose an interpretation that would render the Act of Congress constitutional, while the Court of Appeals chose an interpretation that would render section 318 unconstitutional. Given the presumption of constitutionality afforded Acts of Congress and the rule that statutes are to be interpreted in a manner that renders them constitutionally valid, the Court of Appeals' interpretation of section 318 should be rejected. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const.*, 485 U.S. 568, 575 (1988) (courts are to construe statutes in such a manner as to avoid constitutional doubts, unless such construction is "plainly contrary to the intent of Congress").

C. The Court of Appeals Erroneously Concluded that It Could Not Find Section 318 To Be a Partial Repeal of Other Environmental Statutes

The Court of Appeals' reliance upon the "doctrine disfavoring repeals by implication" discussed in *TVA v. Hill*, 437 U.S. 153, 190 (1978), was misplaced. Congress could not have been clearer in specifying that section 318, rather than the other environmental statutes at issue in the district court cases, was to govern timber sales offered in fiscal year 1990. Where Congress' intent to supersede existing legislation is clear, there is no requirement that Congress expressly recite each statute affected by a new law. *See United States v. Will*, 449 U.S. 200, 222 (1980).

III. SECTION 318 CANNOT VIOLATE THE SEPARATION OF POWERS PRINCIPLE BECAUSE SECTION 318(B)(6)(A) PRECLUDES ANY FINDINGS OF LAW OR FACT WITH RESPECT TO THE STATUTORY MANAGEMENT PLAN SET FORTH IN SECTION 318

Finally, the Court of Appeals completely ignored the significance of the prohibition of judicial review set forth in the second sentence of section 318(b)(6)(A) which provides that "[t]he guidelines adopted by subsections (b)(3) and (b)(5) of [section 318] shall not be subject to judicial review by any court of the United States." By adopting the section 318 guidelines and eliminating the federal courts' jurisdiction to hear challenges to the guidelines, Congress did not "direct[] the courts to find that [the section 318 guidelines] satisfied the environmental laws underlying the ongoing litigation." (Petition for Certiorari at 16a.) Quite the contrary: Section 318(b)(6)(A) substitutes new guidelines for those stemming from existing environmental laws and forbids, rather than compels, the courts to make findings of fact or law with respect to the new guidelines. Therefore, section 318 does not violate the separation of powers principle.

CONCLUSION

The O & C Counties urge this Court to reverse the Court of Appeals' judgment.

Respectfully submitted.

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